REPORT OF THE JUDICIAL COUNCIL ANTITRUST ADVISORY COMMITTEE

DECEMBER 7, 2012

In June 2012, Rep. Lance Kinzer asked the Judicial Council to study and advise the Legislature on whether the rule of reason should be a part of the Kansas Restraint of Trade Act (KRTA). If the answer to the initial question were in the affirmative, Rep. Kinzer further requested that the Judicial Council advise the Legislature on the best way to accomplish the amendments to the KRTA without unintended consequences. The Judicial Council granted Rep. Kinzer's request and appointed Judicial Council members Nick Badgerow and Steve Robison to appoint an advisory committee for the study and to co-chair the committee.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Antitrust Advisory Committee are:

J. Nick Badgerow, Co-Chairman – Practicing attorney and member of the Kansas Judicial Council; Overland Park.

Stephen E. Robison, Co-Chairman – Practicing attorney and member of the Kansas Judicial Council; Wichita.

Jim Armstrong – Practicing attorney; Wichita.

John Campbell – Chief Deputy Attorney General for the State of Kansas; Topeka.

Callie Denton – Attorney for Kansas Association for Justice; Topeka.

Allie Devine – Attorney and lobbyist, Topeka.

Prof. Michael Hoeflich – Professor and former Dean at K.U. Law School; Lawrence.

Prof. Mary Ramirez – Professor at Washburn Law School and formerly worked in Antitrust Division of the U.S. Justice Department; Topeka.

Rep. John Rubin – Attorney and retired federal administrative judge who represents Shawnee and Lake Quivira in the Kansas House of Representatives; Shawnee.

Rex Sharp – Practicing attorney; Prairie Village.

Pat Stueve – Practicing attorney; Kansas City.

Rep. Jim Ward – Practicing attorney who represents southeast Wichita in the Kansas House of Representatives; Wichita.

BACKGROUND

On May 4, 2012, the Kansas Supreme Court issued an opinion interpreting the KRTA. *O'Brien v. Leegin Creative Leather Products, Inc.*, No. 101,000 (Kan. Sup. Ct., May 4, 2012). The Supreme Court ruled on several issues in the *O'Brien* opinion, but the ruling pertinent to this study was stated in Syl. ¶ 7, in which the Supreme Court held:

> "The 'rule of reason' of federal antitrust jurisprudence does not apply to lawsuits under the Kansas Restraint of Trade Act. K.S.A. 50-101, K.S.A. 50-102, and K.S.A. 50-112 forbid all vertical and horizontal price-fixing by two or more persons or between persons. Contrary holdings in *Okerberg v. Crable*, 185 Kan. 211, 341 P.2d 966 (1959), and *Heckard v. Park*, 164 Kan. 216, 188 P.2d 926 (1948)—decided during the period when the Kansas Fair Trade Act, R.S. 1937, 50-301 *et seq.*, was in effect—are overruled."

2012 HB 2797 was introduced on May 10, 2012 in response to the *O'Brien* opinion. On May 11, 2012 the House Judiciary Committee held a hearing on the bill, the stated purpose of which was to correct the interpretation of the KRTA made in the *O'Brien* opinion. The bill noted that the Supreme Court's holding in *O'Brien* is contrary to the intent of the Kansas legislature in enacting the restraint of trade act. Substantively, HB 2797 incorporated into the KRTA the construction and interpretation of federal antitrust law under the Sherman Act, 15 U.S.C. § 1. A copy of HB 2797 is attached to this report at page 12.

Numerous conferees appeared before the Committee, including both proponents and opponents of the bill. Still others submitted written testimony in favor of or opposing the legislation. The proponents of the bill, which included the Secretary of the Kansas Department of Agriculture and other representatives of agriculture-related interests, were concerned that the *O'Brien* opinion was so broad that commonly used business associations, agreements, and contracts were now potentially invalidated or in violation of the KRTA. The proponents also expressed concern that the opinion resulted in uncertainty in conducting business in Kansas. The opponents of the bill were not as closely aligned with each other. Some testified that the *O'Brien* opinion had not resulted in a significant change in Kansas law and, therefore, no legislative action was necessary. Others did not express a specific opinion as to the legal impact of the case, but urged the Judiciary Committee to proceed cautiously, investigate the issue fully, and avoid the pitfalls of legislation passed too hastily.

On May 14, 2012, Chairman Kinzer appointed a subcommittee to meet further on the bill and return to the Judiciary Committee with a recommendation for further action or consideration. The subcommittee's report, dated May 15, 2012, was discussed in a Judiciary Committee meeting held on May 16, 2012. The subcommittee's report proposed a substitute for HB 2797. The proposed bill eliminated the reliance on the Sherman Act as construed and interpreted by federal courts and proposed language intended to modify the KRTA to codify the reasonableness standard employed in the two cases which had been overruled in the *O'Brien* opinion, *Okerberg v. Crable*, 185 Kan. 211, 341 P.2d 966 (1959), and *Heckard v. Park*, 164 Kan. 216, 188 P.2d 926 (1948). A copy of the subcommittee's report is attached at page 13.

The Judiciary Committee, after striking a clause that would have sunset the bill's provisions on June 30, 2013, moved to delete the contents of SB 291 and replace them with the subcommittee's substitute for HB 2797 and to recommend House Substitute for SB 291 favorably for passage. The bill passed out of the House on May 18, 2012, but was not taken up in the Senate. A copy of House Substitute for SB 291, as amended by the House Committee of the Whole, is attached to this report at page 21.

DISCUSSION

The Committee met three times in Topeka and once via teleconference between August and November 2012. Four subcommittee meetings were held via teleconference on additional dates in the same time period.

One of the topics focused on in the Committee's first meeting was the need to clarify the difference between the "rule of reason" under federal antitrust law and a "reasonableness" standard such as that discussed in the *Okerberg* and *Heckard* cases. This concept was confused in the House Substitute for SB 291, which stated that the "Legislature intended for the doctrine of the rule of reason to be applied" when it was actually proposing new language taken from the reasonableness analysis in the *Okerberg* and *Heckard* cases.

The Committee addressed the questions to which it had been asked to respond:

1. Should the Kansas Restraint of Trade Act incorporate the rule of reason?
2. If so, then what specific statutory language best achieves that goal in a way that does not result in unintended consequences?

If the first question was meant to refer only to the federal "rule of reason," which would incorporate federal law and interpretations thereof into Kansas antitrust statutes, only a small minority of the Committee would answer affirmatively. However, the Committee opted to pursue the subject further and also consider whether the "reasonableness" standard from the *Okerberg* and *Heckard* cases should be incorporated in the KRTA.

After extended discussion, it was clear that the Committee members were divided on the underlying question of whether the *O'Brien* opinion had in fact changed Kansas antitrust law and, therefore, whether any legislative action was necessary. In order to provide the Legislature with as much feedback as possible when it next addresses this issue, the Committee agreed to proceed by creating more than one response for the Legislature's consideration. The Committee was divided loosely into two subcommittees tasked with creating separate reports. The division was not precisely aligned with each member's stated position, and each member of the Committee was welcome to participate in either subcommittee's meetings. This enabled lively discussion to continue within each group. Subcommittee One was tasked with making recommendations as to the best way to amend the KRTA to counter the *O'Brien* opinion. Subcommittee Two would be looking into an alternative solution that would address some of the stated concerns about the *O'Brien* opinion, but which would not include major substantive amendments to the KRTA. The two-part report below contains the conclusions and recommendations of the respective subcommittees.

It should be noted that the two subcommittees did reach some common ground. Both groups recommend that the KRTA be amended to explicitly exclude some of the types of associations or agreements about which proponents who testified on HB 2797 expressed concern. The language recommended by the two subcommittees is similar, but not identical.

ALTERNATIVE ONE:

CONSENSUS OF SUBCOMMITTEE ONE: THE KRTA SHOULD BE AMENDED TO INCORPORATE A REASONABLENESS STANDARD

The Kansas legislature should amend the KRTA to make clear that, except in limited circumstances, a reasonableness standard should be employed to evaluate alleged restraints of trade under the act.

This subcommittee contends that prior to the Kansas Supreme Court's decision on May 4, 2012 in *O'Brien v. Leegin Creative Leather Prods.*, 294 Kan. 318 (2012), Kansas courts had employed the following analysis regarding an alleged violation of the KRTA: "The real question is **never** whether there is any restraint of trade, but **always** whether the restraint is reasonable in view of all the facts and circumstances and whether it is inimical to the public welfare." *Heckard v. Park*, 164 Kan. 216, 223-24 (1948) (emphasis added), quoted with approval in *Okerberg v. Crable*, 185 Kan. 211, 217 (1959). The recent *O'Brien* decision expressly overruled both of these cases.

Because it held that a reasonableness standard did not appear on the face of the KRTA, the Kansas Supreme Court did not analyze the competitive impacts of the vertical resale price maintenance policy at issue in the *O'Brien* case. But the great weight of economic authority supports the pro-competitive nature of vertical price and non-price restraints. This authority counsels in favor of clarifying that a reasonableness standard should apply to such types of restraints under the KRTA.

Perhaps the best summary of this economic authority is contained in the United States Supreme Court's opinion in *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S.Ct. 2705 (2007) (*Leegin*). There, the Supreme Court rejected the notion that resale price maintenance agreements ordinarily have anticompetitive effects on the *interbrand* competition with which antitrust law is concerned; rather it noted that such restraints impact only *intrabrand* competition and that "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance." *See id.* at 2715. There are numerous such recognized benefits. Resale price maintenance can encourage retailers to invest in service or promotion efforts that aid the manufacturer's competitive position against other manufacturers; it can enhance *interbrand* competition by preventing "free-riding" by discounting retailers that would otherwise discourage non-discounting retailers from providing demand-enhancing services and promotion; it can give consumers more choices, allowing them to select among low-price, low-service brands, high-price, high-service brands, and brands falling in between; it can facilitate market entry for new firms and new brands; and it can be the easiest, most efficient way of providing retailers incentives to provide enhanced services and promotion. *See id.* at 2715-16. *Leegin* also rejected the argument that resale price maintenance was inherently unreasonable because it generally leads to higher prices. *See id.* at 2718. The Court noted that the existence of a pricing effect was "consistent with both procompetitive and anticompetitive theories," that "a manufacturer has no incentive to overcompensate retailers with unjustified margins" and that, from an economic standpoint, a manufacturer has an economic incentive to set minimum resale prices "only if the increase in demand resulting from enhanced service will more than offset a negative impact on demand of a higher retail price." *See id.* at 2718-19.

This subcommittee finds the United States Supreme Court's discussion of vertical price restraints in the *Leegin* decision to be both thorough and persuasive.

In contrast to vertical restraints, there is general agreement as to the anti-competitive effects of horizontal restraints between or among competitors. For this reason, the proposed legislation makes clear the unlawful nature of such horizontal restraints.

The proposed legislation also clarifies that the KRTA does not apply to certain types of agreements. This clarification is deemed necessary in light of the broad language used in the *O'Brien* decision, and it is intended to eliminate uncertainty and avoid litigation as to such agreements.

Finally, following the *O'Brien* decision, a number of commentators have observed that the decision might well have an impact on a national company's choice of whether or not to do business in Kansas if a different standard for the same conduct applied in this state. The proposed legislation is intended to harmonize the KRTA with other pro-business legislative efforts.

Proposed Legislation (Subcommittee One)

AN ACT concerning the Kansas restraint of trade act; amending K.S.A. 50-101 and 50-112 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) The purpose of this section and the amendments to K.S.A. 50-101 and 50-112 by this act is to clarify and reduce any uncertainty or ambiguity as to the application of the Kansas restraint of trade act and applicable evidentiary standards to certain types of business contracts, agreements and arrangements that are not intended to unreasonably restrain trade or commerce and do not contravene public welfare.

(b) (1) Except as provided in subsection (b)(2), an arrangement, contract, agreement, trust, understanding or combination shall not be deemed a trust pursuant to the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, and shall not be deemed unlawful, void, prohibited or wrongful under any provision of the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, if that arrangement, contract, agreement, trust, understanding or combination is a reasonable restraint of trade or commerce. An arrangement, contract, agreement, trust, understanding or combination is a reasonable restraint of trade or commerce if such restraint is reasonable in view of all of the facts and circumstances of the particular case and does not contravene public welfare.

(2) The reasonableness standard described in subsection (b)(1) shall not apply to any claim of horizontal conduct between or among competitors that otherwise violates the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto.

(c) The Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, shall not apply to:

(1) Any association that complies with the provisions and application of article 16 of chapter 17 of the Kansas Statutes Annotated, and amendments thereto, the cooperative marketing act;

(2) Any trust, agreement or arrangement that complies with the provisions and application of 7 U.S.C. § 291 *et. seq.*, the Capper-Volstead act;

(3) Any trust, agreement or arrangement that complies with the provisions and application of 7 U.S.C. § 181 *et. seq.*, the packers and stockyards act; and

(4) Any franchise agreements or covenants not to compete.

(d) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(e) This section shall be a part of and supplemental to the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto.

Sec. 2. K.S.A. 50-101 is hereby amended to read as follows: 50-101. *Except as provided in section 1, and amendments thereto*, a trust is a combination of capital, skill, or acts, by two or more persons, for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

Second. To increase or reduce the price of merchandise, produce or commodities, when such conduct may lead to increased prices, or to control the cost or rates of insurance.

Third. To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

Fourth. To fix any standard or figure, whereby such person's price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.

Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which such person shall: (a) Bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure;

(b) agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure;

(c) in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or

(d) agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that such person's price in any manner is affected. Any such combinations are hereby declared to be against public policy, unlawful and void.

Sec. 3. K.S.A. 50-112 is hereby amended to read as follows: 50-112. *Except as provided in section 1, and amendments thereto,* all arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorney or doctor fees, and all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to increase the price to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of moneys to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void.

Section 4. This act shall take effect and be in force from and after its publication in the Kansas register.

ALTERNATIVE TWO:

CONSENSUS OF SUBCOMMITTEE TWO: NO AMENDMENT TO THE KRTA IS NECESSARY – BUT IF UNDERTAKEN, ANY AMENDMENT MUST BE SPECIFIC AND NARROWLY TAILORED

Antitrust law protects the bedrock principle of competitive free markets by preventing big businesses from using their market power to restrain competition. Restraints of trade can be direct price fixing, either horizontal or vertical, or indirect non-price like territorial restrictions.

Kansas law has never distinguished between types of restraints of trade in its statutes. There is no mention of horizontal, vertical, vertical price, or vertical non-price restraints. Some attorneys argue that the Kansas Supreme Court, however, made judicial distinctions. The unanimous Kansas Supreme Court traced the history of Kansas antitrust law in *O'Brien.* Kansas has applied the per se standard since the adoption of the K.S.A. 50-112 in 1889. At least as to some types of antitrust restraints (if not all types), Kansas went to a "reasonableness standard" (not rule of reason which had not been invented yet) from 1937-1963 when the Kansas Fair Trade Act (KFTA) was in effect and when *Heckard v. Park*, 164 Kan. 216, 188 P.2d 926 (1948) and *Ockerberg v. Crable*, 185 Kan. 211, 341 P.2d 966 (1959) were decided. Kansas returned to the per se standard for all types of antitrust activity when the KFTA was repealed in 1963, and remains there today. The *O'Brien* opinion has not changed Kansas law.

The 2012 Legislature considered several bills drafted in response to the *O'Brien* opinion to amend the Kansas Restraint of Trade Act. None of the 2012 bills should be reintroduced in future sessions because they are vague, overbroad, unconstitutional in their retroactivity, and unfairly disturb pending litigation. However, legislation could be drafted that would address concerns of business uncertainty, if it is carefully crafted.

If the 2013 Legislature chooses to consider amendments to the KRTA, this subcommittee recommends that any proposed legislation meet the policy criteria set forth below. A proposed amendment that meets these guidelines appears immediately following on page ___.

1. **Anti-competitive activity must continue to be aggressively regulated, and the foundation of the KRTA must be maintained.** Kansas, and the Kansas Legislature, have always taken a strong hand to protect Kansans from unfair competition. No change in course is needed now. Kansas antitrust law precedes federal antitrust law. The Kansas Legislature has permitted both direct and indirect purchasers to obtain a deterrent remedy under the KRTA. Kansas citizens as well as the Attorney General have the ability to enforce the KRTA.

    a. **Horizontal price restraints have always been illegal and must remain illegal (per se.)**

    b. **Vertical price restraints must remain illegal (per se).** There is disagreement about whether such restraints have always been per se illegal in Kansas. It is the subcommittee's interpretation that all types of antitrust activity, including vertical price restraints, have been illegal in Kansas since 1963, and there should be no change.

2. **Any amendments to the KRTA must be specific and narrowly tailored (see proposed new legislation, below).** The KRTA protects Kansas businesses, consumers, and markets. Significant and sweeping changes that tilt the market to the advantage of out of state business will drive up prices for smaller Kansas businesses and Kansas consumers. There is no merit in protecting large out of state competition to the disadvantage of Kansas businesses and consumers. And vague legislation that creates further confusion in the market or unnecessary litigation will likewise hurt businesses and consumers, and slow down the market.

    a. **Consider clarifying that vertical non-price restraints are exempt if limited in scope and widely used today.** Covenants not to compete in employment and business purchase contracts and franchise agreements are two limited vertical non-price restraints that are well known and prevalent in the current Kansas economy, and could be exempted from the KRTA. However, to broadly exempt all vertical non-price restraints would permit creative price fixing and eliminate KRTA remedies that protect consumers and businesses. Permitting a rule of reason or reasonableness standard to measure such restraints would not be effective enforcement.

    b. **Consider clarifying that agriculture and other cooperatives are exempt from Kansas antitrust laws.** Agriculture and other cooperatives have been exempt from Kansas and federal antitrust laws for decades. Nonetheless, to quell any concern, the KRTA could be amended to provide that any association that complies with the provisions and application of K.S.A. 17-1601 *et seq.*, the cooperative marketing act, or any agreement that complies with the federal Capper-Volstead or packers and stockyards acts are not regulated under the KRTA.

3. **Any proposed legislation should not be unconstitutional, retroactive, or disturb pending litigation in its effect.** Legislation that changes the substantive rights of parties is unconstitutional. Legislation that attempts to reroute pending litigation will only result in more litigation; not only will it tie up the parties for years, there will be even more uncertainty for consumers and businesses.

The 5-4 decision of the U.S. Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007) changed almost 100 years of antitrust law based on economic theory, not reality or objective studies. No Kansas manufacturer, Kansas retailer, or Kansas consumer is clamoring for a change in the Kansas antitrust law to allow vertical resale price maintenance agreements because it is not pro-competition or pro-business. This subcommittee contends that there is no economic or legal reason to rewrite the Kansas rules of business other than the minor changes reflected below to address expressed concerns of Kansas franchisors, Kansas cooperatives, and Kansas employers with non-compete agreements.

Proposed Legislation (Subcommittee Two)

AN ACT concerning the Kansas restraint of trade act.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) The Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, shall not apply to:

(1) Any association that complies with the provisions and application of article 16 of chapter 17 of the Kansas Statutes Annotated, and amendments thereto, the cooperative marketing act;

(2) any trust, agreement or arrangement that complies with the provisions and application of 7 U.S.C. § 291 *et seq.*, the Capper-Volstead act;

(3) any trust, agreement or arrangement that complies with the provisions and application of 7 U.S.C. § 181 *et seq.*, the packers and stockyards act;

(4) any covenants not to compete in an employment or business purchase contract; and

(5) any franchise agreement.

(b) This section shall be part of and supplemental to the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto.

Session of 2012

HOUSE BILL No. 2797

By Committee on Appropriations

5-10

AN ACT concerning the Kansas restraint of trade act.

WHEREAS, the purpose of this act is to correct the interpretation of the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, made in *O'Brien v. Leegin Creative Leather Products, Inc.*, No. 101,000, 2012 WL 1563976 (Kan. Sup. Ct., May 4, 2012), which is contrary to the intent of the Kansas legislature in enacting the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto; to prevent wasteful litigation that would likely result if such interpretation is not corrected; to forestall those potentially affected by such interpretation from ceasing or refusing to do business in Kansas in order to avoid potential liability; and to minimize conflicts between the Kansas restraint of trade act and section 1 of the Sherman Act, 15 U.S.C. § 1, and reduce uncertainty as to the law applicable to commerce in Kansas.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) An arrangement, contract, agreement, trust, understanding or combination shall not be deemed a trust pursuant to the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, and shall not be deemed unlawful, void, prohibited or wrongful under any provision of the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, if that arrangement, contract, agreement, trust, understanding or combination is or would be deemed a reasonable restraint of trade or commerce under section 1 of the Sherman Act, 15 U.S.C. § 1, as construed and interpreted by the federal courts.

(b) Any private action to enforce any provision of the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, shall not be brought as a class action.

(c) The provisions of this section shall apply retroactively in any pending or future litigation.

(d) This section shall be a part of and supplemental to the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto.

Sec. 2. This act shall take effect and be in force from and after its publication in the Kansas register.

Report of the Subcommittee on HB 2797 to the House Committee on Judiciary

CHAIRPERSON: Representative Bob Brookens

OTHER MEMBERS: Representatives John Rubin, Pat Colloton, Jan Pauls, Melanie Meier, and Jim Ward.

STUDY TOPICS

- The subcommittee was charged with studying HB 2797, which would amend the Kansas Restraint of Trade Act (KRTA). The bill was introduced in response to a recent decision of the Kansas Supreme Court, *O'Brien v. Leegin Creative Leather Products, Inc.*, No 101,000, 2012 WL 1563976 (Kan. Sup. Ct. May 4, 2012), which rejected the application of the federal "rule of reason" doctrine to lawsuits brought under the Kansas Restraint of Trade Act (the KRTA), such that an antitrust plaintiff need not demonstrate the unreasonableness of a defendant's trade restraint to show a statutory violation. Further, the case overruled the application of such doctrine in *Okerberg v. Crable*, 185 Kan. 211, 341 P.2d 966 (1959), and *Heckard v. Park*, 164 Kan. 216, 188 P.2d 926 (1948).

May 15, 2012

CONCLUSIONS AND RECOMMENDATIONS

The subcommittee recommended HB 2797 be amended to modify the language of the "Whereas" clause to indicate the bill's purpose is to correct the interpretation of the KRTA made in *O'Brien v. Leegin Creative Leather Products, Inc., No 101,000, 2012 WL 1563976 (Kan. Sup. Ct. May 4, 2012)*. Additionally, it would state the Kansas Legislature intended for the doctrine of the rule of reason to be applied in cases involving arrangements, contracts, agreements, trusts, understandings, or combinations under the KRTA. Further, to determine reasonableness, the subcommittee's proposed amendment would replace the application of the Sherman Act with the following factors, based on *Okerberg v. Crable*, 185 Kan. 211, 341 P.2d 966 (1959), and *Heckard v. Park*, 164 Kan. 216, 188 P.2d 926 (1948):

- Such restraint is reasonable in view of all the facts and circumstances of the particular case; and
- Such restraint does not contravene public welfare.

The proposed amendment also would remove the class action and retroactivity provisions and add a severability clause and a June 30, 2013 sunset date.

BACKGROUND

HB 2797, amending the Kansas Restraint of Trade Act (KRTA), was introduced in response to a recent decision of the Kansas Supreme Court, *O'Brien v. Leegin Creative Leather Products, Inc.*, No 101,000, 2012 WL 1563976 (Kan. Sup. Ct. May 4, 2012), which rejected the application of the federal "rule of reason" doctrine to lawsuits brought under the KRTA, such that an antitrust plaintiff need not demonstrate the unreasonableness of a defendant's trade restraint to show a statutory violation. Further, the case overruled the application of such doctrine in *Okerberg v. Crable*, 185 Kan. 211, 341 P.2d 966 (1959), and *Heckard v. Park*, 164 Kan. 216, 188 P.2d 926 (1948).

As introduced, the bill would add a new section to the KRTA stating an arrangement, contract, agreement, trust, understanding, or combination would not be deemed a trust under the KRTA and would not be deemed unlawful, void, prohibited, or wrongful under the KRTA if it would be deemed a reasonable restraint of trade or commerce under the federal Sherman Act. Further, it would provide that any private action to enforce the KRTA could not be brought as a class action. The bill would apply retroactively in any pending or future litigation.

Committee Action

After being appointed by House Committee on Judiciary Chairman, Lance Kinzer, on Monday, May 14, 2012, the subcommittee agreed to meet later that day on recess or adjournment of the House. At that meeting, the subcommittee members offered their opinions on the bill. Members acknowledged that time for consideration was limited, but expressed concern that the *O'Brien* opinion may cast uncertainty over existing business agreements. Given the relatively short amount of time within which to act, the subcommittee agreed adding a June 30, 2013 sunset date to the bill would be appropriate, requiring prompt reconsideration of any action taken in the 2012 Legislative Session. Further, because of time constraints, the subcommittee agreed to remove the provisions of the bill concerning class actions.

The subcommittee then identified two issues it would consider before moving forward with the bill: whether and to what extent current law should be amended to preserve the application of the doctrine of the rule of reason in Kansas; and whether the bill should be applied retroactively. On the issue of reasonableness, the subcommittee opposed the reliance on the Sherman Act as construed and interpreted by federal courts.

After additional discussion and input from the audience, the subcommittee asked the staff of the Revisor's Office to draft two proposed amendments to the bill for consideration at a meeting to be held the following morning. The amendments would remove the references to federal law and class action provisions; identify factors for courts to consider to determine whether an arrangement, trust, understanding, or combination is a reasonable restraint of trade or commerce; amend the retroactivity language to provide the bill would apply to any arrangement, trust, understanding, or combination formed or in existence prior to, on, and after May 14, 2012; and add a severability clause and the June 30, 2013 sunset provision.

At the first meeting of Tuesday, May 15, 2012, Representative Brookens noted that Representative Jan Pauls was unable to attend, and Representative Melanie Meier, who had also attended the May 14th meetings, attended in her place. After additional discussion on the issues noted previously and input from audience members, the subcommittee asked the staff of the Revisor's Office to draft an additional amendment that would revise the language of the "Whereas" clause included in the bill as introduced and adopt the reasonableness factors proposed by Representative Colloton. The subcommittee agreed to meet later that day on recess or adjournment of the House.

At the second May 15th meeting, the subcommittee agreed to the revised "Whereas" clause, after removing references to horizontal and vertical arrangements, and to strike all provisions related to prior and future application of the bill. The subcommittee agreed to meet again that afternoon to finalize its proposed amendment before presenting it to the full House Committee on Judiciary.

The final proposed amendment was adopted at the third meeting. It would modify the language of the "Whereas" clause to indicate the bill's purpose is to correct the interpretation of the KRTA made in *O'Brien*. Additionally, it would state the Kansas Legislature intended the doctrine of the rule of reason be applied in cases involving arrangements, contracts, agreements, trusts, understandings, or combinations under the KRTA. Further, the subcommittee's proposed amendment would replace the application of the Sherman Act with the following factors for determining reasonableness, based on *Okerberg v. Crable* and *Heckard v. Park*:

- Such restraint is reasonable in view of all the facts and circumstances of the particular case; and

- Such restraint does not contravene public welfare.

The proposed amendment would also remove the class action and retroactivity provisions and add a severability clause and a June 30, 2013 sunset date.

Session of 2012

HOUSE BILL No. 2797

By Committee on Appropriations

5-10

HB 2797 Subcommittee
Prepared By: Office of Revisor of Statutes
FINAL - May 15, 2012, 5:00 P.M.

AN ACT concerning the Kansas restraint of trade act; amending K.S.A. 50-101 and 50-112 and repealing the existing sections (SEE ATTACHED)

WHEREAS, the purpose of this act is to correct the interpretation of the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, made in *O'Brien v. Leegin Creative Leather Products, Inc.*, No. 101,000, 2012 WL 1563976 (Kan. Sup. Ct., May 4, 2012), which is contrary to the intent of the Kansas legislature in enacting the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto~~; to prevent wasteful litigation that would likely result if such interpretation is not corrected; to forestall those potentially affected by such interpretation from ceasing or refusing to do business in Kansas in order to avoid potential liability; and to minimize conflicts between the Kansas restraint of trade act and section 1 of the Sherman Act, 15 U.S.C. § 1, and reduce uncertainty as to the law applicable to commerce in Kansas.~~; and

WHEREAS, The Kansas legislature intended for the doctrine of the rule of reason to be applied in cases involving an arrangement, contract, agreement, trust, understanding or combination under the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) An arrangement, contract, agreement, trust, understanding or combination shall not be deemed a trust pursuant to the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, and shall not be deemed unlawful, void, prohibited or wrongful under any provision of the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, if that arrangement, contract, agreement, trust, understanding or combination is ~~or would be deemed~~ a reasonable restraint of trade or commerce ~~under section 1 of the Sherman Act, 15 U.S.C. § 1, as construed and interpreted by the federal courts.~~ An arrangement, contract, agreement, trust, understanding or combination is a reasonable restraint of trade or commerce if such restraint is reasonable in view of all of the facts and circumstances of the particular case and does not contravene public welfare.

~~(b) Any private action to enforce any provision of the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, shall not be brought as a class action.~~ Strike

~~(c) The provisions of this section shall apply retroactively in any pending or future litigation.~~

(b) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(c) The provisions of this section shall expire on June 30, 2013.

(d) This section shall be a part of and supplemental to the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto.

Sec. 2. This act shall take effect and be in force from and after its publication in the Kansas register.

HB 2797 Subcommittee Balloon attachment (Prepared By: Office of Revisor of Statutes)

Sec 2. K.S.A. 50-101 is hereby amended to read as follows: 50-101. Except as provided in section 1, and amendments thereto, a trust is a combination of capital, skill, or acts, by two or more persons, for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

Second. To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.

Third. To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

Fourth. To fix any standard or figure, whereby such person's price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.

Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which such person shall: (a) Bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure;

(b) agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure;

(c) in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or

(d) agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that such person's price in any manner is affected. Any such combinations are hereby declared to be against public policy, unlawful and void.

Sec 3. K.S.A. 50-112 is hereby amended to read as follows: 50-112. Except as provided in section 1, and amendments thereto, all arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorney or doctor fees, and all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of moneys to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void.

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Substitute for HOUSE BILL NO. 2797

By Committee on Judiciary

AN ACT concerning the Kansas restraint of trade act; amending K.S.A. 50-101 and 50-112 and repealing the existing sections.

WHEREAS, The purpose of this act is to correct the interpretation of the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, made in *O'Brien v. Leegin Creative Leather Products, Inc.*, No. 101,000, 2012 WL 1563976 (Kan. Sup. Ct., May 4, 2012), which is contrary to the intent of the Kansas legislature in enacting the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto; and

WHEREAS, The Kansas Legislature intended for the doctrine of the rule of reason to be applied in cases involving an arrangement, contract, agreement, trust, understanding or combination under the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto:

Now, therefore,

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) An arrangement, contract, agreement, trust, understanding or combination shall not be deemed a trust pursuant to the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, and shall not be deemed unlawful, void, prohibited or wrongful under any provision of the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, if that arrangement, contract, agreement, trust, understanding or combination is a reasonable restraint of trade or commerce. An arrangement, contract, agreement, trust, understanding or combination is a reasonable restraint of trade or commerce if such restraint is reasonable in view of all of the facts and circumstances of the particular case and does not contravene public welfare.

(b) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(c) This section shall be a part of and supplemental to the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto.

(d) The provisions of this section shall expire on June 30, 2013.

Sec. 2. K.S.A. 50-101 is hereby amended to read as follows: 50-101. Except as provided in section 1, and amendments thereto, a trust is a combination of capital, skill, or acts, by two or more persons, for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

Second. To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.

Third. To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

Fourth. To fix any standard or figure, whereby such person's price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.

Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which such person shall: (a) Bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure;

(b) agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure;

(c) in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or

(d) agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that such person's price in any manner is affected. Any such combinations are hereby declared to be against public policy, unlawful and void.

Sec. 3. K.S.A. 50-112 is hereby amended to read as follows: 50-112. Except as provided in section 1, and amendments thereto, all arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorney or doctor fees, and all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of moneys to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void.

Sec. 4. K.S.A. 50-101 and 50-112 are hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the Kansas register.

{As Amended by House Committee of the Whole}

Session of 2012

House Substitute for SENATE BILL No. 291

By Committee on Judiciary

5-16

AN ACT concerning the Kansas restraint of trade act; amending K.S.A. 50-101 and 50-112 and repealing the existing sections.

WHEREAS, The purpose of this act is to correct the interpretation of the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, made in O'Brien v. Leegin Creative Leather Products, Inc., No. 101,000, 2012 WL 1563976 (Kan. Sup. Ct., May 4, 2012), which is contrary to the intent of the Kansas Legislature in enacting the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto; and

{WHEREAS, Prior to May 4, 2012, the Supreme Court of Kansas had accurately interpreted the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, and such interpretations have been consistent with the intent of the Kansas Legislature in enacting the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, and such interpretations made prior to May 4, 2012, shall continue to be considered viable precedent in the state of Kansas; and}

WHEREAS, The Kansas Legislature intended for the doctrine of the rule of reason to be applied in cases involving an arrangement, contract, agreement, trust, understanding or combination under the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto**{, as heretofore articulated by the Supreme Court of Kansas prior to May 4, 2012}**:

Now, therefore,

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) An arrangement, contract, agreement, trust, understanding or combination shall not be deemed a trust pursuant to the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, and shall not be deemed unlawful, void, prohibited or wrongful under any provision of the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, if that arrangement, contract, agreement, trust, understanding or combination is a reasonable restraint of trade or commerce. An arrangement, contract, agreement, trust, understanding or combination is a reasonable restraint of trade or commerce if such restraint is reasonable in view of all of the facts and

circumstances of the particular case and does not contravene public welfare.

(b) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(c) This section shall be a part of and supplemental to the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto.

{(d) The provisions of this section shall expire on June 30, 2013.}

Sec. 2. K.S.A. 50-101 is hereby amended to read as follows: 50-101. *Except as provided in section 1, and amendments thereto,* a trust is a combination of capital, skill, or acts, by two or more persons, for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

Second. To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.

Third. To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

Fourth. To fix any standard or figure, whereby such person's price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.

Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which such person shall: (a) Bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure;

(b) agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure;

(c) in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or

(d) agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that such person's price in any manner is affected. Any such combinations are hereby declared to be against public policy, unlawful and void.

Sec. 3. K.S.A. 50-112 is hereby amended to read as follows: 50-112. *Except as provided in section 1, and amendments thereto,* all arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorney or doctor fees, and all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of moneys to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void.

Sec. 4. K.S.A. 50-101 and 50-112 are hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the Kansas register.